Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

Petitioner,

—*v.*—

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED JUNE 21, 1979
CERTIORARI GRANTED NOVEMBER 26, 1979

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

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—*v.*—

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

INDEX TO APPENDIX

	Page
1. Relevant Docket Entries of the District Court of Oklahoma County, State of Oklahoma, in the matter of *State of Oklahoma* v. *Flynn Noye Hicks*, CRF 76-4597	1
2. Relevant Docket Entries of the Court of Criminal Appeals of the State of Oklahoma in the matter of *Flynn Noye Hicks* v. *State of Oklahoma*, No. F-77-751	3
3. Information dated December 15, 1976, charging Flynn Noye Hicks with Unlawful Distribution of a Controlled Dangerous Substance and page 2 of said Information charging Flynn Noye Hicks with commission of a felony after prior felony convictions	4
4. Court's Instructions (Second Charge) instructing the jury on the law pertaining to the after prior felony convictions charge against Flynn Noye Hicks	7
5. Transcript of the second stage trial against petitioner on the after prior felony charge pursuant to 21 O.S. Supp. 1976, § 51(B) (pp. 158-186 of the Transcript)	11
6. Transcript of the Hearing on Judgment and Sentence against petitioner (pp. 188-200 of the Transcript)	30
7. Jury verdicts against Flynn Noye Hicks	39
8. Jury verdict against Dianne Elizabeth Jones	41

Page

9. Judgment and Sentence on Conviction against Flynn Noye Hicks dated April 21, 1977 42

10. Motion for New Trial filed by Flynn Noye Hicks, filed on April 21, 1977 45

11. Order Overruling Motion for New Trial dated April 21, 1977 47

12. Notice of Appeal by Flynn Noye Hicks to the Oklahoma Court of Criminal Appeals, filed in the District Court of Oklahoma County, State of Oklahoma, on April 21, 1977.... 48

13. Petition in Error filed by Flynn Noye Hicks in the Oklahoma Court of Criminal Appeals on October 21, 1977.... 50

14. Designation of Record on Appeal to the Court of Criminal Appeals, State of Oklahoma 53

15. Supplemental Designation of Record to the Court of Criminal Appeals, State of Oklahoma 55

16. Opinion of the Oklahoma Court of Criminal Appeals affirming the Judgment and Sentence against Flynn Noye Hicks, filed March 8, 1979 57

17. Order Denying Petition for Rehearing and Issuance of Mandate Forthwith in the Oklahoma Court of Criminal Appeals dated April 6, 1979 61

18. Order of the United States Supreme Court granting motion of petitioner for leave to proceed in forma pauperis, and granting the Petition for Writ of Certiorari 62

RELEVANT DOCKET ENTRIES

IN THE DISTRICT COURT, OKLAHOMA COUNTY STATE OF OKLAHOMA

No. CRF-76-4597

STATE OF OKLAHOMA

vs.

DIANNE ELIZABETH JONES, a/k/a DIANNE HOLMES & FLYNN NOYE HICKS

Date	Entry
4-12-77	Ent: Case comes on for trial. State app. through Dist. Atty. Leonard Gebb. Deft's app. in person and by counsel's Bill. Page, James Pierceson. Both sides announce ready. Jurors called to box and sworn to answer questions. Jury sworn to try case. opening statements by pltf. and defts. Witnesses sworn evidence introduced. Trial cont. to April 13, 1977 at 9:00 Am. owens
4-13-77	Ent: Comes on for cont trial from 4-12-77. Witnesses sworn pltf. and deft. rest. court instructs Jury, argument jury retires to deliberate & return to box with verdict's of Flynn Noye Hicks guilty of unlawful distr. of a controlled dangerous subst. signed by foreman Anthony Walker. Dianne Elizabeth Jones guilty of unlawful distr. of a controlled dangerous subst. signed by foreman Anthony Walker. Jury retires to deliberate on second stage & return to box with verdicts of Flynn Noye Hicks guilty of unlawful distr. of a controlled dangerous subs. after been previously convicted of two felony offenses & assess his punishment at imprisonment in the State Penit. for a term of 40 years. Signed by foreman Anthony Walker. Have previously found the deft. Dianne Elizabeth Jones guilty of unlawful dist. of a controlled dangerous subst. & we now assess her punishment at impris. for a term of 5 years & a fine of $1,000.00 signed by foreman Anthony Walker. Owens

Date	Entry
4-14-77	Filed true verdict 11-589
4-14-77	Filed true verdict 11-638
4-14-77	Filed true verdict 11-588
4-14-77	Filed true verdict 11-587
4-14-77	Filed courts inst. (second charge)
4-21-77	Ent: Deft. Flynn Hicks present in person and by counsel, James Pearson. State by Leonard Gebb. Comes on for hearing on mot. for new trial and for sent. Mot. for new trial overruled, exceptions allowed. Deft. comes on for sent. It is the judg. and sent. of the court that the deft. Flynn Hicks be confined in the state penit at McAlester, Okla., for a period of forty years. Sent. to begin on delivery to the warden. All of to which the deft. excepts and exceptions are allowed, and the deft. files in open court written notice of intention to appeal to the court of criminal appeals, and makes written request for a transcript. Clerk directed to note same on appearance docket. Deft. given six months to perfect appeal. Appeal bond set in the amount of $25,000.00
4-21-77	Filed design. of record on appeal
4-21-77	Filed not. of appeal and request for trial record at pub. exp.
4-21-77	Iss. judg. and sent. 12-2256 Owens
5-9-77	Filed Bound Record for appeal to Court of Criminal Appeals (not including transcripts)
8-10-77	Filed Supplemental Desig of Record

RELEVANT DOCKET ENTRIES

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. F-77-751

FLYNN NOYE HICKS, APPELLANT,

vs.

STATE OF OKLAHOMA, APPELLEE.

Date	Entry
Oct. 21, 1977	Leave to file w/out costs, Bussey, P.J. Petition in Error Original Record (one legal length folder of 36 pp) Transcript (one Bound Volume of 208 pp) Copy to A.G. Issue Certificate of Appeal
May 5, 1978	JE: Order, Bussey, P.J.—Submitting cause, copies to attys.
Mar. 8, 1979	JE: Opinion: Affirmed Bussey, J. Copies to Attys; Hon. Charles Owens; Press: Not for Publication; Public Defender, Okla. County, Cert. #156074
Mar. 23, 1979	Appellant (pro se) Petition for Rehearing
Apr. 6, 1979	JE: Order, Cornish, P.J., Brett, J., & Bussey, J. Order Denying Petition for Rehearing and Issuance of Mandate Forthwith—copies to Attys. & appellant pro se
Nov. 30, 1979	Copy of Order of Supreme Court of U.S. /s/ Michael Rodak, Jr., Granting Certiorari.

IN THE DISTRICT COURT, IN AND FOR
OKLAHOMA COUNTY, STATE OF OKLAHOMA

CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

DIANNE ELIZABETH JONES and FLYNN NOYE HICKS,
DEFENDANT.

INFORMATION

In the name and by the authority of the State of Oklahoma, comes now ANDREW M. COATS the duly appointed, qualified and acting District Attorney in and for Oklahoma County, District No. 7, State of Oklahoma, and on his official oath gives the District Court in and for said Oklahoma County, State of Oklahoma, to know and be informed that theretofore, to-wit:

On or about the 5 day of October A.D., 1976, in Oklahoma County, State of Oklahoma

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS

whose more full and correct names are to your informant unknown, then and there being, did then and there willfully, unlawfully and feloniously commit the crime of

UNLAWFUL DISTRIBUTION OF A CONTROLLED
DANGEROUS SUBSTANCE—HEROIN
(63 O.S.A. 2-401)

in the manner and form as follows, to-wit:

That is to say, the said defendants, acting conjointly and together, in the county and state aforesaid, and on the day and year aforesaid, then and there being, did then and there wilfully, unlawfully, wrongfully and

feloniously distribute a controlled dangerous substance, to-wit: HEROIN in the form of a brown powdery substance, by selling the same to one E. MAJOR for the sum of $50.00 good and lawful money of the United States of America, paid to the said defendants by the said E. MAJOR; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Oklahoma.

ANDREW M. COATS
District Attorney
District No. 7
Oklahoma County, Oklahoma

By /s/ James R. McKinney
JAMES R. MCKINNEY
Assistant District Attorney

STATE OF OKLAHOMA, OKLAHOMA COUNTY, SS.:

I, J. BIRDSONG, being duly sworn on my oath, declare that the statements set forth in the above information are true.

/s/ J. Birdsong

Subscribed and sworn to before me this 15 day of December, 1976.

DAN GRAY, County Clerk

By /s/ [Illegible]
Deputy

[SEAL]

I, the undersigned District Attorney of the Seventh Judicial District, Oklahoma County, State of Oklahoma, do upon my official oath, further give the said Court to know and be informed that the offense of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE, HEROIN as charged in the within Information was committed by the defendant, FLYNN NOYE HICKS, names therein, after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary:

BURGLARY IN THE SECOND DEGREE on the 4th day of June, 1970 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-70-1250;

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-75-2198.

ANDREW M. COATS,
District Attorney

By /s/ James R. McKinney
JAMES R. MCKINNEY
Assistant District Attorney

I, DAN GRAY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 2 day of Jan., 1980.

DAN GRAY
Court Clerk

By /s/ [Illegible]
Deputy

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

COURT'S INSTRUCTIONS (Second Charge)

No. 1

Members of the Jury:

In the second portion of the charge set out in the Information in this case, the State alleges the following:

I, the undersigned District Attorney of the Seventh Judicial District, Oklahoma County, State of Oklahoma, do upon my official oath, further give the said Court to know and be informed that the offense of Unlawful Distribution of a Controlled Dangerous Substance, Heroin, as charged in the within Information was committed by the defendant, Flynn Noye Hicks named therein, after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary: BURGLARY IN THE SECOND DEGREE on the 4th day of June 1970 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-70-1250.

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975, in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-75-2198.

You have by your verdict found this defendant guilty of Unlawful Distribution of a Controlled Dangerous Substance. It is now your duty to determine, from the evidence, under the instructions, and beyond a reasonable

doubt, if this defendant has previously been convicted of a felony. That is, you must now determine whether this defendant was convicted of any or all of those crimes alleged by the State in the second sheet of the Information, all as set out above.

No. 2

To this second portion of the charge the defendant Flynn Noye Hicks has entered a plea of not guilty, which casts on the State the burden of proving the material allegations of the second portion of the Information to your satisfaction beyond a reasonable doubt before you would be justified in returning a verdict finding that the defendant has previously been convicted of a felony.

This second portion of the Information is simply the charge upon which the defendant is placed upon trial on this issue and sets forth in a formal way the offense of which the defendant is accused. It is in and of itself no evidence of the defendant's guilt of any former conviction, and you should not allow your selves to be influenced against the defendant by reason of the filing of this second sheet of the Information.

The defendant is presumed to be innocent of the charge made against him in the second portion of the Information and innocent of each and every material element of said charge, and this presumption of innocence continues until such time as his guilt of this second charge is shown to your satisfaction beyond a reasonable doubt. If, upon a consideration of all the evidence, facts and circumstances in the case you entertain a reasonable doubt of the guilt of the defendant of the charge made against him in the second portion of the Information, you must give him the benefit of that doubt and return a verdict of not guilty of that second portion of the charge alleging the commission of a crime "after former conviction of a felony".

No. 3

You have by your verdict found the defendant Dianne Elizabeth Jones guilty of the crime of Unlawful Distribution of a Controlled Dangerous Substance. It is

now your duty to assess this defendant's punishment for the commission of this offense.

This defendant is not charged with convictions of any previous felonies. In such case the laws of the State of Oklahoma provide that the punishment for Unlawful Distribution of a Controlled Dangerous Substance is imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00).

No. 4

You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.

Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.

Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.

Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00).

No. 5

All the previous instructions given you in the first part of this trial apply where applicable and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them together and not just a part of them.

You are reminded that you shall not allow sympathy, sentiment or prejudice to affect your deliberations, but you shall do your duty as jurors impartially and faithfully as you swore you would do. You must not use any kind of chance in reaching your verdict concerning punishment but rest it upon the opinion of each juror who agrees with it.

You have already elected a foreman, who alone will sign your verdict. Your verdict must be unanimous. Numerous forms of verdicts will be given you. Only one of these forms is applicable to the defendant Dianne Elizabeth Jones. You should properly fill out that verdict form within the provisions of these instructions. The remainder of the verdict forms apply to the defendant Flynn Noye Hicks. From them you should choose only the one to be used by you in expressing your decision and properly fill it out within the provisions of these instructions. When you have reached a verdict all of you in a body must return it in open court.

The law provides that you shall now listen to and consider the further arguments of the lawyers.

Date April 14, 1977

/s/ [Illegible]
District Judge

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, and DIANNE ELIZABETH JONES
aka DIANNE HOLMES, DEFENDANTS

TRANSCRIPT OF THE SECOND STAGE TRIAL AGAINST PETITIONER ON THE AFTER PRIOR FELONY CHARGE PURSUANT TO 21 O.S. SUPP. 1976, § 51(B)
(pp. 158-186 of the Transcript)

[158] (THEREUPON, the following transpired in chambers on the 14th day of April, 1977)

THE COURT: Let the record show that we are in chamber. Do you gentlemen have something that you want to tell me.

MR. PEARSON: Yes, sir.

MR. GEB: We have a stipulation.

MR. PEARSON: The stipulation on the part of the Defendant Hicks is that the two convictions for Burglary in the Second Degree and Assault and Battery with a Dangerous Weapon with Intent to do Bodily Injury listed on page 2 of the Information are final judgments and not subject to appeal, that the certified copies the District Attorney will introduce are true and correct copies of the originals on file with the Court Clerk of the District Court of Oklahoma County, and that these two convictions arose out of separate transactions.

MR. GEB: And that they were represented by counsel at the time.

MR. PEARSON: And that he was represented by counsel.

THE COURT: I don't know how you can stipulate if you don't stipulate that your man is this man.

MR. PEARSON: We can make that stipulation, because on the face of the Judgment and Sentences, it does have the name of the attorneys in each case, Joe Black and Archibald [159] Hill.

MR. PAGE: Jim, what Judge is talking about is—well, I better not say.

MR. PEARSON: We make the stipulation that they arose out of separate transactions, because they are five years apart, the Judgment and Sentences.

MR. GEB: Wouldn't it save a lot of time to ask Joe Black? If there is any dispute that he was convicted of this, Joe Black can tell you this.

THE COURT: Why don't you stipulate that these are the official Judgment and Sentences from the records of the Court Clerk and they purport—appear to be final Judgment and Sentences, and that the Defendant was represented by counsel at the time, well—

You are not agreeing that that Defendant and your man are one and the same?

MR. PEARSON: Yes.

THE COURT: The State is required to prove that?

MR. PEARSON: That's what I thought I said.

THE COURT: I don't think that you can stipulate to that and say, but we don't say that this defendant is the man.

MR. PEARSON: No, I'm not saying that.

THE COURT: All you have stipulated to is that we don't have to call the Court Clerk over and so forth to [160] show the authenticity of these things.

MR. PEARSON: Yes.

THE COURT: All right. We have got it and I'll tell the jury that.

(THEREUPON, discussion was had off the record)

THE COURT: Let the record show that we are in chambers and Mr. Pearson has stated that he has no objection to the Court's proposed Instructions.

Do you, Mr. Page?

MR. PAGE: No, sir.

THE COURT: Does the State?

MR. GEB: State has no objections.

THE COURT: All right. Let me know immediately when your witnesses get here.

MR. GEB: Yes, sir.

(THEREUPON, chamber hearing adjourned)

[161] (THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PAGE: Your Honor, I visited with my client and she says that she wants to file a Motion to Vacate this guilty verdict.

She has researched some law on her own and she wants to do this prior to the time of sentencing. And I informed her if she felt like that she did not get a fair trial, she could appeal this case and have all of the errors that she feels like were committed could be reviewed by the Court of Criminal Appeals.

THE COURT: Tell her that I will do that on the Motion for New Trial, that I'll hear anything she wants to give me at the time of sentencing.

MR. PAGE: That was in substance what she wants.

THE COURT: All right.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

THE COURT: Members of the Jury, the final stage of this trial is on the punishment—is devoted to assessing the punishment.

In that connection, the State will first read to you the second page of the Information that applies to the previous felony convictions of one of the Defendants. [162] And then, the State will make its statement of what it will prove here in the second stage. Afterwards, you will hear the Defendants' statements if they care to make opening statements.

The State will then prove certain things to you which are pertinent to punishment. After that, I'll read the Instructions setting out the punishment, and you'll hear the closing arguments and then you will deliberate this second stage of the trial.

The State will now read to you the Information's second sheet and give its opening statement.

MR. GEB: Ladies and Gentlemen of the Jury, I read to you the Information, the second part of this case.

(THEREFORE, Mr. Geb read the Information to the jury)

MR. GEB: To the Information on the second sheet, the Defendant enters his plea of not guilty, which puts each and every material allegation set forth in the Information in issue in this case.

The State will introduce two Judgment and Sentences in this case. We will introduce and show that on the 4th day of June, 1970, that the Defendant Flynn Noye Hicks was convicted of Burglary in the Second Degree.

And we will have the officer in connection with that, who will testify and tell you that this is one and the same person.

[163] And we will have Mr. Dan Gray to testify to the fact that this was filed of record and is an official record of the Clerk's Office of the District Court of Oklahoma County, and that he had an attorney, that the case had not been appealed from, and that it's a final judgment.

We will also introduce and show by a Judgment and Sentence that on the 21st day of October, 1975, Flynn Hicks, being represented by Joe L. Black at that time, was convicted of Assault with a Dangerous Weapon with Intent to do Bodily Harm After a Former Conviction of a Felony.

We will show the Court and the jury that this is a final judgment, that it has not been appealed from, that he was represented by counsel.

And when we have shown you and introduced these exhibits, and introduced the officers that will testify in this case that he is one and the same person, the State will rest upon the submission of that evidence.

THE COURT: Mr. Page, do you care to make a statement?

MR. PAGE: No, Your Honor, not at this time. We will reserve ours.

THE COURT: Mr. Pearson.

MR. PEARSON: We will reserve ours, Your Honor.

THE COURT: All right. Call the first witness for the State.

[164] MR. GEB: At this time, I wonder if we might possibly have some stipulation.

(THEREUPON, bench conference was had)

(State's Exhibit Nos. 5 and 6 were marked for the purpose of identification)

MR. GEB: At this time, the State would like to introduce State's No. 5 and State's No. 6.

MR. PEARSON: No objection.

THE COURT: I'll tell the jury about the stipulation.

MR. GEB: Yes, sir.

THE COURT: State's Exhibit Nos. 5 and 6, are Judgment and Sentences on pleas of guilty. One is June 4, 1970, where it reflects this Defendant—a Defendant, Flynn Noye Hicks, was convicted of Burglary in the Second Degree.

You'll read it more fully and see what the sentence imposed was.

And the other one is a Judgment and Sentence on a plea of guilty on October 21, 1975, a Flynn Noye Hicks, entered a pleas of guilty to Assault with a Dangerous Weapon with Intent to do Bodily Harm.

The parties—the lawyers, Mr. Pearson and the State have—Mr. Pearson has agreed with the State that these are official records of the Court [165] Clerk of Oklahoma County, that they do reflect convictions of felony offenses on those certain dates, that these convictions were had, at the time that the Defendant was represented by counsel, and that they are final convictions.

The Defendant does not stipulate that this Defendant and the Defendant Hicks are one and the same person.

The State will have to prove that. With that stipulation, the State will call its witness.

MR. GEB: Mr. Curlee.

(State's Exhibit Nos. 5 and 6 were offered and admitted into evidence)

[166] THEREUPON

W. L. CURLEE

the witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEB:

Q State your name?
A W. L. Curlee.
Q What is your business, Mr. Curlee?
A I am a detective with the Oklahoma City Police Department.
THE COURT: Pull the microphone down and speak loudly into it.

BY MR. GEB: (Continuing)

Q And how long have you been with the police department?
A Twenty years.
Q Officer Curlee, I'm handing you State's Exhibit No. 5, pertaining to the Judgment and Sentence of guilty, State of Oklahoma versus Flynn N. Hicks, case number CRF-75-2198—no, 75—I mean, pardon me, 70-1250, are you acquainted with that Judgment and Sentence?
A Yes, sir.
Q Are you acquainted with Flynn N. Hicks that is named in that Judgment and Sentence?
[167] A Yes, sir, I am. I handled this case back in 1970.
Q Yes, sir.
Do you see the man, Flynn N. Hicks, in the Courtroom today?
A Yes, sir.
Q Will you point him out and tell the jury where he is sitting?
A Sitting at the table there between the two men in the suits.

Q All right. And is he one and the same person that received that Judgment and Sentence against him on that date in that case?
A Yes, sir.
MR. GEB: All right.
MR. PEARSON: No questions, Your Honor.
MR. GEB: May he be excused?
THE COURT: You just asked him about one.
MR. GEB: Sir?
THE COURT: Didn't you just ask him about one?
MR. GEB: Yes, sir. I have another witness on the other.
THE COURT: All right. You may be excused.

(Witness excused)

MR. GEB: Would you send the other officer in, please.

[168] THEREUPON

EDDIE HOCKLETUBBE

the witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEB:

Q State your name?
A Eddie Hockletubbe.
Q And where—
MR. PEARSON: I'm sorry. May we approach the bench, Your Honor.
THE COURT: If you need to, yes.

(THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PEARSON: Comes know the Defendant and objects to this witness testifying for the reason his name is not—has not been endorsed on the information.
MR. GEB: His name is on it.

THE COURT: It's not on here. Do you move to introduce or endorse it?

MR. GEB: Yes, sir.

THE COURT: I will permit him to endorse him. And I don't think that the Defendant is prejudiced by it.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

[169] BY MR. GEB: (Continuing)

Q Officer, is that Hockletubbe?

A Hockletubbe.

Q Hockletubbe. I hand you what has been marked and identified as State's Exhibit No. 6 in case number CRF-75-2198—

THE COURT: First, did you ask him who he is employed with?

MR. GEB: I'm sorry.

BY MR. GEB: (Continuing)

Q Where are you employed?

A Police officer of the Oklahoma City Police Department.

Q How long have you been employed there?

A A little over eight years.

Q Now, were you employed in the year 1975?

A I was.

Q I hand you State's Exhibit No. 6, will you tell us the name of the Defendant there?

A Mr. Flynn Hicks.

Q Are you acquainted with that case?

A (No response)

Q That numbered case, CRF —

A Yes, I am.

Q And do you see Mr. Hicks in the Courtroom here [170] today?

A Yes, I do.

Q Would you point him out to the jury, and tell them where he is sitting, please?

A Mr. Hicks is the black man with the mustache and the multi-colored dark shirt, sitting over at there.

Q Is he one and the same person that was convicted—is he the same person that was convicted of State's Exhibit No. 6?

A Yes, he was.

Q And did you handle that case?

A Yes.

MR. GEB: All right. That's all.

THE COURT: Mr. Pearson?

MR. PEARSON: No questions, Your Honor.

THE COURT: All right. That's all. Thank you.

MR. GEB: May he be excused, Your Honor.

THE COURT: Yes.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Is there any other witnesses?

MR. GEB: That's all.

THE COURT: Do you rest?

MR. GEB: We rest.

THE COURT: The Defendant Hicks, the State has [171] rested.

MR. PEARSON: The Defendant Hicks rests, Your Honor.

THE COURT: Mr. Page.

MR. PAGE: The Defendant Jones rests, Your Honor.

THE COURT: All right. All parties have rested. I'll read to you now, Members of the Jury, the Instructions that apply in this phase.

(THEREUPON, the Court read the Instructions on phase two of the trial to the jury)

THE COURT: The State has the first argument, you'll now listen to Mr. Geb.

MR. GEB: Thank you, Your Honor.

Ladies and Gentlemen of the Jury, you've heard the stipulation that His Honor announced, that these two exhibits were exhibits from the Court Clerk's office. They were the official records pertaining to Flynn Noye Hicks.

We did put on the two officers that arrested and had the investigation and so forth of Flynn Noye Hicks in

the other two cases, Burglary and Assault with a Deadly Weapon.

So we feel that the State has proved absolutely and beyond any doubt that this is the one and the same person. The officers both said that he was the same person that was [172] convicted on these two charges. And that is the only evidence, Ladies and Gentlemen, that came to you this morning.

Now, the Legislature in its wisdom has felt apparently that this was a very serious crime, and is very more serious when after a person has been convicted of two felonies. Two felonies.

I don't think that the law means anything to Mr. Hicks, after having two convictions and then a third conviction here yesterday, a third felony conviction.

And the only way, Ladies and Gentlemen, that we can stop this sale and eliminate the pushers of heroin in this community is to come back with a substantial verdict, and a verdict that the evidence justifies.

It's mandatory the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.

It is mandatory that they get forty years if you find that he has been convicted of two felonies before. And you've heard the evidence that he had been.

You heard the officers testify to that that he was one and the same person. You heard the stipulation that this was the official record.

Now as to Dianne Elizabeth Jones, her punishment goes from five years to twenty years. I would ask the jury to consider—seriously consider a term of fifteen years in [173] her case, because Heroin as you know is a very serious thing. The possession of heroin isn't as bad, but when you start pushing it or selling it, like the evidence —like you found from the evidence that she was, then it becomes a serious thing.

I don't know how many people have been convicted of things like this, and how many people suffer from the sale of heroin in the community—Oklahoma community, Oklahoma County community.

And I ask you as a deterrent and taking strong stand, a stand that says that the pushers are not welcome here in Oklahoma County; and when we get them up to the Courtroom, we are going to give them a substantial verdict.

And the State would be interested in hoping that you take a strong stand on the pusher and find them guilty. And take a strong stand and return a verdict of fifteen years as punishment for her, and a term of forty years as set out in the statutes as mandatory by the State Legislature.

Thank you, Ladies and Gentlemen.

THE COURT: Mr. Pearson.

MR. PEARSON: May it please the Court, Ladies and Gentlemen of the Jury, about the last thing that I said to you yesterday was to ask you when you went into the jury room, Do I believe Eugene Major beyond a reasonable doubt. [174] If you do, bring back a verdict of guilty.

That was done. We have to accept that as the law, because you are the jury, the judges of the facts, and we have to accept that.

Now, it's time to assess the punishment. And as the Instructions said, you will receive many forms of verdicts that apply to my client, Flynn Noye Hicks.

The one verdict form that I would like to talk to you about is a verdict form where you will be able to assess five to twenty years when you fill in the punishment, and a fine up to $20,000.

As the Judge told you, I'm a Public Defender. Mr. Hicks has no money. And a fine in this case would be totally inappropriate because there is no way in the world that he could even begin to pay a fine.

And now, all through this trial, Mr. Page and I have asked you to let your reason dominate, not your prejudices, not your—not an attempt to inflame you to act as a lynch mob psychology, Let's do it now and think about it tomorrow.

The prosecutor in his closing arguments tried to say that yesterday when we didn't have a chance to response to it.

When the District Attorney says mandatory forty years, that is not quite true. If you should find from your [175] —by your verdict certain things, then the law says that you've got to do it.

But you don't have to find those things. You are the judges of the facts. For this brief period of time, each of you symbolically put on black robes and you have your job. Judge Owens is the judge of the law, and you are the judges of the facts.

If you believe that forty years for one sale of heroin is so excessive, so unfair, then sign the verdict form which says, five to twenty years and zero dollars.

There's a little space to put the zero in there, for the amount of fine, come back in here and tell us in open Court that that is your verdict, that you have decided these facts and that's the end of this case.

Ladies and Gentlemen, that's why we are asking for your reason, your logic. What's fair in this case. We're not trying to ask for sympathy. We don't want any sympathy. We want your justice.

The District Attorney wants to inflame. He almost reminds me in his closing argument of the stereotype western. Everybody trying to beat down the jail.

And the Marshal trying to hold them off and saying, Let's have a little bit of reason. Let's have a little bit of law here.

Except Mr. Geb is trying to tell you, the same [176] as the Marshal turning around and saying, Yeah, come on, boys. I'll help you do it. I'll think about it tomorrow.

That's the kind of blind passion that he is trying to stir up in you. We're asking for reason? We're asking for you to consider the verdict forms, on that verdict form, five to twenty years.

You can do it. You decide the facts. If you want a verdict form on five to twenty years, sign that form and come back and let Mr. Hicks go to prison.

Thank you very much, Ladies and Gentlemen.

THE COURT: Mr. Page.

MR. PAGE: Thank you, Your Honor. Ladies and Gentlemen, I guess, this is probably the most difficult part

for the defense attory after you've found his client guilty, and then asking you to assess the proper punishment in the case. And I have found it most difficult, too.

We lawyers in our pleadings pray for and pled for certain things. And we are asking you today as far as Dianne Jones goes; because the Court has instructed you that the range of punishment in her case is for five—not less than five to twenty years.

You have a range of five to twenty years plus a $20,000 fine. She has not by this filing been convicted previously with any felonies otherwise it would be more.

So her range of punishment is separate from Mr. [177] Hicks.

And now, Mr. Geb has asked you to give this young lady fifteen years in the State Penitentiary. Granted whether it be one sale or several sales of heroin, it's not a good thing for the public in this county or any place; however, consider during your deliberations the fact that it was only one sale.

And as I've pointed this out to you yesterday, had this individual or these individuals made additional sales, I don't believe they would have left them on the streets of Oklahoma City from October 5 to December 15 before they brought them in.

Their activities, Mr. Geb leads you to believe that these are probably big time pushers. We have one sale with each individual that you have found them guilty of.

There is no indication that—in this trial that these are big time pushers. Mr. Geb will say, Well, okay, let's get all of the pushers off.

Fine, I agree with him, but at the same time, don't let him lead you to believe that the testimony from this witness stand that these are big time pushers. There is no evidence to that whatsoever.

Ladies and Gentlemen, I feel in my opinion based upon the evidence in this case which you found my client guilty, that a punishment of five years would be rather [178] severe for this client.

Mr. Geb mentioned in his voir dire of you, he was selecting the jury, that one of these Defendants would have maybe children involved.

I don't know about Mr. Hicks. My client has children—three children. Her husband is sitting right there in the green and black shirt.

MR. GEB: We are going to object—

THE COURT: Sustained.

MR. GEB: —Your Honor, because it's not a part of the evidence in this case.

THE COURT: Sustained.

MR. PAGE: And we would ask that the punishment—and I don't know what inflames the District Attorney to ask for fifteen years. I was a District Attorney, myself, an Assistant, some years back with Mr. Harris.

But to ask for fifteen years in this type of case, from the evidence that you've heard, that's what you want to do based upon his prayer for that, why, fine.

But you consider the evidence in this case based upon what you have heard, what you have considered, come back with a five year penalty which is the minimum amount of time.

And I think that you would feel that I was negligent in my duty if I didn't ask you to give her the [179] minimum punishment. I'm certain no competent defense counsel would ask you to give her twenty years.

So, Ladies and Gentlemen, for me and my client, we ask that you assess the punishment at the minimum of five years.

Thank you.

THE COURT: Mr. Geb.

MR. GEB: Ladies and Gentlemen, before I do close, I do want to thank you for listening and being so attentive in both of these periods.

It's very important to the attorneys on both sides to have the case well considered, and you have. You have considered it and listened to it very attentively.

Mr. Pearson really shocked me when he said, Well, you can go around and give him five—you can give him five years to twenty.

And Mr. Pearson, I thought heard the Court's Instructions. The Court's Instructions were that under number four. You may like to read this.

"Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the [180] "State Penitentiary."

Forty years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated.

He even agreed with me that these were the official records. And now, he comes in and wants you to ignore the official records, ignore the—all of the evidence presented in this case.

He tells you, Well, why don't you just slip by that, kind of cast your eyes the other way. Ladies and Gentlemen, you as jurors will follow the law.

You all said you would as I know you will in this case. The law says that two previous convictions, then it shall be forty years.

And I—the State doesn't feel that there is really any alternative on it; because the only evidence that you've heard is two previous convictions, and that's unrefuted. He stipulated to that.

And the officers said this was the same man that was involved in it.

Now as to Dianne, I could have asked for twenty years very naturally. I don't know how many lives have been destroyed by these people.

I don't know how much—what their activities were; but we were able to catch them on this particular case. [181] And that doesn't—well, you can see yourself what —we know nothing about anything else concerning this except that we were lucky enough to catch them.

They might have made that sale and we couldn't catch them until the next day, then we would catch them on another sale.

Ladies and Gentlemen, anything that is sold as heroin, the worst drug on the market, the worst drug. And you will be doing a service to your community, and a service

to the children and adults in this community, by coming back with a strong verdict.

A strong verdict that says, We're going to ask for a substantial punishment on dope pushers. We are against the dope pushers destroying our children and our families and our community and destroying the morale of our whole system.

If you will come back with that, and come back with a strong verdict, you will always be proud that you sat on this jury and that you did your part in stopping this tide of sale of heroin. The worst drug that ever hit the Oklahoma City area.

Thank you, Ladies and Gentlemen. Thank you, again, for listening.

THE COURT: You'll now retire again and deliberate this second stage of the trial and return us a verdict.

[182] You'll take with you the Instructions, the first and second set of Instructions. You'll take the two exhibits that have been admitted into evidence. Look them over.

There are as I have said in my Instructions, four possible verdict forms. One of these applies only to the Defendant Dianne Elizabeth Jones.

The other three are applicable to the Defendant Hicks. In other words, you will do as you did before, you will endorse one verdict for each of them.

Choose the one that you think is the proper one as to Hicks, and return all of them to us. Your foreman should have at that time signed two of the verdict forms.

Let us know—press the buzzer when you have a verdict or if you necessarily—you think you need to report something short of a verdict.

Please read your Instructions. As I have stated in the first stage, they contain everything that I know about, that you should have in this case.

I think if you will read them, if you think you have a question, I think if you will reread them, the answer is there.

It was before and it is now. Let us know when you have a verdict.

[183] (THEREUPON, the jury retired to deliberate their verdict)

(THEREUPON, the jury returned to the Courtroom)

THE COURT: Thank you. You may be seated.

Mr. Foremen, have you reached a verdict?

THE FOREMAN: Yes, we have, sir.

THE COURT: Would you please hand them to the Bailiff.

(THEREUPON, the foreman handed the documents to the Bailiff)

THE COURT: The Clerk will read them.

(THEREUPON, the Clerk read the verdicts, after which the Court inquired of the jury individually if this is their verdict to which each answered in the affirmative)

THE COURT: These records will be received and properly filed. I'll set the date of sentencing one week from today, April 21, at nine a.m.

(THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PEARSON: Your Honor, Mr. Hicks wants permission to talk to you.

THE COURT: Let's excuse the jury first.

MR. PEARSON: All right.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

THE COURT: Members of the Jury, that concludes [184] service in this case, and I want to express our appreciation to you for it.

Criminal matters are difficult matters for juries to sit and decide. I'm sure that it's a very awesome responsibility to determine the punishment—the guilty or in-

nocence of one's peers and even more awesome to fix the punishment.

(THEREUPON, the Court had further discussion with the jury, after which the jury was excused and the following transpired in open Court after all jurors left the Courtroom)

THE COURT: Mr. Hicks, come up, please.

(THEREUPON, Defendant Hicks and counsel approached the bench)

THE COURT: Your lawyer says that you have something that you want to say to me. The proper time to do that—if it's some legal matter concerning these verdicts, the proper time to do it is at the time of the sentencing which is one week from today.

At which time, I will hear your lawyer, he will file a Motion for New Trial, and I'll hear you.

DEFENDANT HICKS: Judge.

THE COURT: Yes.

DEFENDANT HICKS: Your Honor, I just wanted the record to show that I would like a transcript of my preliminary hearing and of my District trial hearing and all of the documents pertaining to my case.

[185] Judge, I want to appeal. I'm innocent.

THE COURT: That's what I'm saying—what I was just saying. At that time if the Motion for New Trial is overruled, then you can show me that you are not able to pay for those things, I'll order a transcript of the trial proceedings.

And I'll appoint a lawyer to represent you on appeal. That comes later. This Judgment and Sentence, the sentencing comes usually later, a week or so later after the trial.

But I'll hear you at that time on any other matters that you care to be heard on. And that applies to—Mr. Page, come up and bring your client up also.

(THEREUPON, Defendant Jones and counsel approach the bench)

THE COURT: That applies to you also, Mrs. Jones. You wanted to say something earlier, and I told your lawyer to tell you that I would hear that sort of thing at the time of sentencing which has been set for one week from today, the 21st.

DEFENDANT JONES: All right.

THE COURT: I'll hear your lawyer's Motion for New Trial and anything that you wish to tell me at that time. I'll also hear you.

DEFENDANT JONES: Okay.

THE COURT: Meanwhile, do you have anything [186] further?

DEFENDANT HICKS: No, sir, I don't.

THE COURT: He will be remanded to the custody of the sheriff.

Mrs. Jones, you will remain on that bond. You must be here without fail April 21, one week from today, at nine o'clock a.m.

DEFENDANT JONES: Yes, sir.

THE COURT: Is that all, gentlemen?

MR. PEARSON: Yes, Your Honor.

MR. PAGE: Yes, sir.

MR. GEB: Yes.

(THEREUPON, Court adjourned)

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, DEFENDANT

* * * *

HEARING ON JUDGMENT AND SENTENCE

HEARD ON THE 21st day of April, 1977

PRESIDING: THE HONORABLE CHARLES L. OWENS
District Judge

* * * *

[188] (THEREUPON, the following transpired in open Court on the 21st day of April, 1977)

THE COURT: CRF-76-4597, State of Oklahoma versus Dianne Elizabeth Jones and Flynn Noye Hicks.

I'll take the Hicks matter first since I have some other companion matters in the Jones case.

Come up here, Mr. Hicks.

(THEREUPON, Defendant Hicks and his counsel approached the bench)

EXAMINATION BY THE COURT:

Q You are Flynn Noye Hicks?
A Yes, sir.
Q How old are you?
A Twenty-eight.
Q Mr. Pearson, is your lawyer, is that right?
A Yes, sir.

THE COURT: Do you believe your client to be competent to understand the nature of these proceedings, Mr. Pearson?

MR. PEARSON: Yes, sir, Your Honor.

THE COURT: The Court so finds.

BY THE COURT: (Continuing)

Q You have been convicted, Mr. Hicks, of Unlawful Distribution of a Controlled Dangerous Substance by a jury, and the jury assessed your punishment at forty years [189] imprisonment, do you understand that?

A Yes, sir.

Q You have a right to file a Motion for New Trial, have you filed that motion?

MR. PEARSON: Your Honor, we file it in open Court at this time.

THE COURT: All right. I'll hear you on your motion.

MR. PEARSON: Thank you, Your Honor.

The Defendant Flynn Hicks moves for a new trial for all of the grounds listed in the Motion for New Trial; but in particular, we would urge the first three errors in the Motion for New Trial.

As the Court will remember, the key in this case was the credibility of the two witnesses, Atwood and Major.

And we believe an error of the Court in prohibiting the Defendant from impeaching the testimony of the witness, Eugene Major, by the use of prior inconsistencies in statements through the testimony of Brent Barnes.

We believe that in any criminal prosecution, the Defendant has the right to impeach the credibility of a witness by calling another witness who would testify that the prior witness has made an inconsistent [190] statement.

And the inconsistent statement that we sought to have elicited was crucial—was the crucial issue in this case, whether the witness Major was telling the truth about whether he had committed perjury or not in the preliminary hearing, and dealing with the incident described herein.

We believe that the denial of our right to impeach the witness Major by the testimony of Barnes was prejudicial to this Defendant's defense.

And the second error is that we were prohibited from reading from the preliminary hearing transcript to the witness Barnes to verify the accuracy of the preliminary hearing, the transcript.

We believe under the laws of Oklahoma that for that purpose there is no requirement that the transcript be on file.

And that the prejudice that resulted was in essence the same prejudice that resulted from errors in number one.

That we were deprived of putting forth before the jury the inaccuracies of Major's testimony on crucial parts and what we believe to be outright lies.

The third error is that the Court erred in permitting the State to recall witnesses, Major and [191] Atwood, after the rule had been invoked and after they had admitted conferences.

And it was obvious that they said that they did testify—that they had talked about the case during the recesses.

THE COURT: What is wrong with that?

MR. PEARSON: Well, after the rule had been invoked and then recalling them back, Your Honor. That's the whole purpose of the rule.

THE COURT: They weren't in here during the testimony of each other.

MR. PEARSON: That's true, Your Honor, but they went back to discuss this. They admitted discussing their testimony and then coming back in.

And we believe that to be a prejudicial error.

And for all of the other errors, we have alleged four through nine, we believe that this Defendant is entitled to a new trial in this matter.

THE COURT: Mr. Geb.

MR. GEB: Of course, Your Honor, the Court thoroughly went into this transcript matter, the reporter —we had what looked like a transcript that was unsigned and unstamped.

The original was not available, never been filed. The reporter didn't even have his notes available. We [192] asked him about his notes, and he didn't even have his notes to refer to.

And to put him on the stand out of the clear blue sky without his notes, without the original, or without anything else, we think that certainly is not prejudicial in not permitting him to testify.

And the Court so ruled at that time. And we felt that the Court was right on that.

And he did—the Defendant's attorney did interrogate from what purported to be—which I don't know whether it was or not—a transcript.

It was some sheets of paper with some typing on it, certainly not a transcript. And he did thoroughly go into it with Mr. Major, the witness.

I don't see how he could be prejudiced in any way. And Major and Atwood being recalled, Your Honor. They didn't say that they were talking about their testimony.

And as I remember the record, and at that, they were not in the Courtroom; so we feel that these motions, the Court considered them thoroughly at the time except the third one—and this is something new.

But the first and second ones, the Court overruled. And as I recall the Defendant didn't even object any way to the third one at the time. Maybe he [193] did, but I don't recall it.

And all of the rest of the ones are just frivolous apparently, becaue he hasn't argued any of them. And we would ask that the Court to overrule the motion.

MR. PEARSON: Your Honor, as to the first alleged error, the Defendant did make an offer of proof that Brent Barnes could testify from his memory without notes as to the prior oral inconsistent statements just as any witness would do.

And for that reason we believe that if nothing else, error number one should result in a motion—should result in a new trial.

THE COURT: All right. Is there anything further?

MR. PEARSON: No, Your Honor.

THE COURT: All right. Do you know of any legal cause why judgment should not be pronounced other than what you have told me about in your Motion for New Trial?

MR. PEARSON: No, Your Honor.

THE COURT: All right. And Mr. Hicks, do you have anything to say?

DEFENDANT HICKS: Yeah. I don't want to make anybody mad, but it's just a question that I just wanted [194] to know, you know, the transcript that they wouldn't let—you know, to be admitted into evidence.

It was the only transcript that was here in Court that day, and Mr. District Attorney used it to let Major refresh his memory from it.

And you know, he said it wasn't certified, but he refreshed his memory from it. And it must have been what he said in the preliminary—you know, the evidence, the inconsistent statements.

And I was there, and he refused all of it. He said that he didn't say any of that, and I was there and I heard him say it, Your Honor.

Your Honor, I'm just not—I'm just—I didn't do nothing that he said. Your Honor, I'm innocent.

THE COURT: Of course, that's what the jury is all about. I don't rule on whether you are guilty or not guilty, do you understand that?

I rule on questions of law. It is for the attorney who defends you about the transcript. There are some legal things that you couldn't be expected to know about that.

DEFENDANT HICKS: Yes, sir.

THE COURT: Do you have anything further?

DEFENDANT HICKS: I'm innocent. I didn't sell that man any dope. I didn't even see no dope, Judge.

[195] THE COURT: All right. If there is nothing further, the Motion for New Trial is overruled with exceptions.

It will be the sentence of the Court in accordance with the jury verdict that the Defendant is sentenced to forty years imprisonment.

The appeal bond is set at $25,000.

BY THE COURT: (Continuing)

Q You have a right, you understand, Mr. Hicks, to appeal this to the Court of Criminal Appeals?

A Yes, sir.

Q To have an attorney appointed for such an appeal, if you are unable to hire an attorney. And to have a free transcript of the trial proceedings if you are not able to pay for that?

A Yes, sir.

Q And in order to appeal, you would have to give your Notice of Intention to Appeal within ten days—in writing within ten days from today.

Do you wish to appeal this Judgment and Sentence?

A Yes, sir, I would like to appeal.

Q Are you able to hire an attorney to take your appeal?

A No, I'm not, Your Honor.

THE COURT: Does the State know of any reason [196] or believe that he is able to hire an attorney?

MR. GEB: We would like to ask him if he has any property of any kind.

THE COURT: You may ask him that.

MR. GEB: Do you have an automobile?

DEFENDANT HICKS: No, I sure don't. I don't have any money. I wasn't even able to make a $5,000 bond.

MR. GEB: You don't have any furniture?

DEFENDANT HICKS: No, I don't.

MR. GEB: Or property of any kind?

DEFENDANT HICKS: No, I don't.

MR. GEB: Under those circumstances, Your Honor, we have no objections to him having a Public Defender.

THE COURT: I will appoint—The Court appoints the Public Defender to represent you on your appeal, and I order that the transcript of the trial proceedings be provided at public expense.

DEFENDANT HICKS: Well, Your Honor, could I get my transcript and all of the things pertaining to my case?

THE COURT: Speak up so we can hear you.

DEFENDANT HICKS: Could I get a transcript of my hearings be sent to me. I would like to have them.

THE COURT: You can get together with the Public [197] Defender. He will need it first of all, to draw up his brief for the Court of Criminal Court of Appeals.

He has to brief the case and prepare a brief and file it with them. And that's done by reading the transcript, his copy.

The original will be filed, and he'll have a copy. And I would imagine that he can set that to you.

MR. PEARSON: Yes, Your Honor.

THE COURT: And once he is finished with it.

Do you have anything further to ask me or tell me?

DEFENDANT HICKS: I'm—ain't no words for this, Your Honor. I haven't got no words for this. This is a horrible hearing

THE COURT: You may be held in the county jail at least ten days if you care to or transported to the penitentiary immediately.

DEFENDANT HICKS: I'll take the ten days.

THE COURT: You would like to be held?

DEFENDANT HICKS: Yes, sir.

THE COURT: And during that time, I'm sure that your attorney will want to talk to you about the appeal.

This summary sets out what I have asked you and what you have answered and the rulings that I have made [198] today.

If it's accurate, you and your lawyer should sign it.

DEFENDANT HICKS: I want to know who's going to handle my appeal down there.

THE COURT: They have, I believe—Mr. Elliott, come up, please.

(THEREUPON, Mr. Elliott approaches the bench)

THE COURT: Mr. Hicks is inquiring about who will handle this appeal. I believe that you have an appellate division in your office now.

MR. ELLIOTT: That's correct.

THE COURT: Is that right?

MR. ELLIOTT: That's correct. It will be John Stuart, and he will be up to see him.

THE COURT: Very well. He will be held ten days, so—

MR. ELLIOTT: All right.

THE COURT: —Mr. Stuart will see him.

MR. ELLIOTT: He will do that, yes.

THE COURT: The Public Defender's office has a special division now. That's all they do is to handle appeals.

Mr. Stuart—Mr. John Stuart, Mr. Elliott tells me that he will be up to see you. Mr. Elliott is the [199] Public Defender.

MR. PEARSON: Your Honor, here is an Order of the Court overruling the Motion for New Trial, a Designation of record, and an Order for Transcript.

THE COURT: He dosen't necessarily need to sign it if he doesn't care to. The transcript of the proceedings will show what we did.

MR. PEARSON: Also, Your Honor, we file a Notice of Appeal and a Request for Transcript at Public Expense. That's all we have, Your Honor.

THE COURT: All right. If there is nothing further, the Defendant is remanded to the sheriff.

DEFENDANT HICKS: Oh, do I—I wanted to ask, do I have an option today? Do I have to let the State handle my appeal.

THE COURT: No, of course, you may hire your own attorney. That's what I was asking you before, whether you had funds to hire your own attorney.

You mean the Public Defender? Whether you have to hire them?

DEFENDANT HICKS: Yes.

THE COURT: That's who I appoint if you are unable to or don't have any money to hire your own lawyer.

If you have your own money to hire an attorney, [200] of course, then the Public Defender will withdraw and he can take over.

DEFENDANT HICKS: All right.

THE COURT: If you should find that you are able to hire an attorney, you immediately let the Public Defender know and he will withdraw from that, and tell me about it.

I'll let your attorney be listed as the attorney of record for the appeal, and he will have full—the full burden of filing that for you.

(THEREUPON, hearing adjourned)

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilty of Unlawful Distribution of a Controlled Dangerous Substance.

/s/ Anthony W. Walker, Jr.
Foreman

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilty of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years.

/s/ Anthony W. Walker, Jr.
Foreman

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, have previously found the defendant Dianne Elizabeth Jones guilty of Unlawful Distribution of a Controlled Dangerous Substance and we now assess her punishment at imprisonment for a term of 5 years and a fine of $000.00—.

/s/ Anthony W. Walker, Jr.
Foreman

THE STATE OF OKLAHOMA)
) ss.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
Sitting in and for Oklahoma County, Oklahoma

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 21st day of April, 1977, the same being a judicial day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant FLYNN NOYE HICKS being personally present in open court, and being duly represented at all appearances before the court by his attorney of record JIM PEARSON, and having been legally charged with the offense of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and

sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY.

It is Therefore, Ordered, Adjudged and Decreed by the Court that FLYNN NOYE HICKS is sentenced to a term of FORTY (40) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $64.60, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to

be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

[SEAL]

/s/ Charles L. Owens
CHARLES L. OWENS
District Judge

Attest:

DAN GRAY
DALE SMITH
Court Clerk

/s/ Betty White
Deputy Court Clerk

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

MOTION FOR NEW TRIAL

Comes now the defendant, FLYNN NOYE HICKS, and moves this Honorable Court to vacate and set aside the verdict of the jury rendered and entered herein on the 14th day of April, 1977, and to grant this defendant a new trial herein, for the following reasons and causes which materially effect the substantial, constitutional and statutory rights of this defendant, to-wit:

1) Error of the Court in prohibiting the defendant from impeaching the testimony of witnesses Eugene Major by the use of a prior inconsistent statement through the testimony of the witness Brent Barnes.

2) Error of the Court in prohibiting the defendant from reading the preliminary hearing transcript to the witness Brent Barnes to verify the accuracy of the preliminary hearing transcript.

3) Error of the Court in permitting the State to recall the witness Major and Atwood in the State's case in chief for the reason it violated the rule which was invoked.

4) Error of the Court in overruling the defendant's demurrer to the evidence at the conclusion of all the evidence to which the defendant duly excepted.

5) Error at law occurring at trial and duly excepted to by the defendant.

6) Error of the Court in admitting, over the defendant's objections and exceptions, incompetent, irrelevant, immaterial and prejudicial evidence.

7) The verdict of guilt is not sustained by sufficient evidence and is contrary to the law.

8) Error of the Court in failing to adequately instruct upon the applicable law.

9) The Court erred in failing to protect the statutory and constitutional rights of this defendant and to give him a fair and impartial trial as guaranteed by the Constitution of the United States and the Constitution of the State of Oklahoma.

/s/ Jim Pearson
JIM PEARSON
Assistant Public Defender
Attorney for Defendant

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, DEFENDANT

ORDER OVERRULING MOTION FOR NEW TRIAL

Now on this 21st day of April, 1977, this cause of action coming duly and regularly on for hearing upon the motion for new trial filed herein by defendant, and the Plaintiff, The State of Oklahoma, appearing by the District Attorney of Oklahoma County, Oklahoma, and the defendant being present in person and by his attorney, JIM PEARSON and the Court having heard said motion and being fully advised in the premises finds that said motion should be overruled and a new trial herein denied.

IT IS THEREFORE ORDERED AND ADJUDGED THAT the Motion of the defendant for new trial be and the same is hereby overruled. To which finding and Order of the Court the defendant excepted.

And thereupon the Court passed judgment and sentence upon the defendant as is recited in the journal entry of Judgment and Sentence herein; to which Judgment and Sentence the defendant excepted.

/s/ Charles L. Owens
District Judge

Approved as to form:

/s/ Leonard Geb
Assistant District Attorney

/s/ Jim Pearson
JIM PEARSON
Attorney for Defendant

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

NOTICE OF APPEAL AND REQUEST FOR TRIAL RECORD AT PUBLIC EXPENSE

Comes now FLYNN NOYE HICKS, defendant above, and gives notice of intention to appeal the Judgment and Sentence herein to the Court of Criminal Appeals, and requests that trial record be prepared; and in this connection alleges that he is indigent, wholly without funds, property or resources whatsoever to pay the costs of a trial record; that his friends and family and likewise without funds, property or resources whatsoever to pay such expense; and further that his attorney cannot prepare a proper trial record from memory.

WHEREFORE, defendant prays that the Court order a trial record to be prepared at public expense.

/s/ Flynn Noye Hicks
Defendant

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

FLYNN NOYE HICKS, first being sworn, states that he has read the foregoing request for trial record at public expense and that the matters therein stated are true.

/s/ Flynn Noye Hicks
Defendant

Subscribed and sworn to before me on April 21, 1977.

DAN GRAY
Court Clerk

By: /s/ Angela Morris
Deputy

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Court of Criminal Appeals No. F-77-751
District Court Case No. CRF-76-4597

Filed Oct. 21, '77

FLYNN NOYE HICKS, APPELLANT,

vs.

THE STATE OF OKLAHOMA, APPELLEE.

PETITION IN ERROR

Comes now the above named appellant, by and through his attorney of record, and shows this Court the following:

I

Appellant was convicted upon trial by jury in the Oklahoma County District Court, Case No. CRF-76-4597, for the offense of Unlawful Distribution of a Controlled Dangerous Substance, to wit: Heroin, in violation of 63 O.S. Supp. 1976, § 2-401, and his punishment was fixed by the jury at a term of imprisonment of Forty (40) years in the State Penitentiary, and accordingly, judgment and sentence was imposed on the 21st day of April, 1977, in accordance with the jury verdict;

II

A Motion for New Trial was filed on the 21st day of April, 1977, with same being overruled on that date, at which time formal written notice of intent to appeal was filed and designation of record made;

III

The trial court fixed the appeal bond in the amount of twenty-five thousand ($25,000) dollars, and the appellant is currently incarcerated;

IV

The specificity of the following enumerated errors upon which this appeal is taken is limited by the late filing of the transcript and original record and the appeal is based on the following errors, to wit:

1. Error of the trial court in prohibiting the appellant from impeaching the testimony of witness Eugene Majors by use of a prior inconsistent statement through the testimony of the witness Brent Barnes;
2. Error of the trial court in prohibiting the appellant from reading the preliminary hearing transcript to the witness Brent Barnes to verify the accuracy of the preliminary hearing transcript;
3. Error of the trial court in permitting the State to recall witnesses Major and Atwood in the State's case in chief for the reason it violated the rule which was invoked;
4. Error of the trial court in overruling appellant's demurrer to the evidence at the conclusion of all the evidence to which appellant duly excepted;
5. Error of the court in admitting, over appellant's objections and exceptions, incompetent, irrelevant, immaterial and prejudicial evidence;
6. Errors of law occurring at trial and duly excepted to by appellant;
7. The verdict of guilty is not sustained by sufficient evidence and is contrary to law;
8. Error of the trial court in failing to adequately instruct upon the applicable law;
9. Error of the trial court in failing to protect the statutory and constitutional rights of this appellant and to give him a fair and impartial trial as guaranteed by the Constitution of the United States and the Constitution of the State of Oklahoma;

WHEREFORE, appellant prays that the judgment and sentence be reversed and the cause be remanded for a

new trial, or in the alternative for any other relief this Court deems just and appropriate.

FLYNN NOYE HICKS,
Appellant
JOHN T. ELLIOTT
Public Defender,
Oklahoma County

By: /s/ John M. Stuart
JOHN M. STUART
Assistant Public Defender
Chief, Appellate Division

Attorneys for Appellant

CERTIFICATE OF SERVICE (omitted in printing)

IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

CRF-76-4597

Filed Apr. 21, '77

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

FLYNN NOYE HICKS, DEFENDANT.

DESIGNATION OF RECORD ON APPEAL

Comes now the defendant, and requests the Court Clerk to prepare the original record for purposes of lodging an appeal in the Court of Criminal Appeals. The appeal time is to start from a ruling made in the District Court on April 21, 1977. Said original record shall contain the following material from the District Court file:

This designation of record.
District Court Information.
Order Appointing Counsel.
Jury instructions.
Judgment and Sentence.
Motion for new trial.
Order overruling motion for new trial.
Notice of appeal and request for transcript.
Summary of facts on sentencing.

In addition to the above documents the following portions of the record are to be transcribed by the court reporter.

All trial proceedings except opening statement, closing argument and voir dire.

Hearing on Sentencing. (John T. Elliott, 4/21/77) Testimony of all witnesses.

All motion hearings.

/s/ Jim Pearson
JIM PEARSON,
Assistant Public Defender
Attorney for Defendant.

I, Shirley Casey West, court reporter for the above-styled case, do hereby acknowledge this request for transcript on this 21st day of April, 1977.

/s/ Shirley Casey West
Court Reporter

CERTIFICATE OF SERVICE (omitted in printing)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. CRF 76-4597

Filed Aug. 10, '77

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

FLYNN NOYE HICKS, DEFENDANT.

SUPPLEMENTAL DESIGNATION OF RECORD

Comes now the defendant and respectfully requests the court reporter to prepare the following portions of the trial record in addition to the original designation of record as said portion was inadvertently not designated:

Opening arguments
Closing arguments

Respectfully submitted,

JOHN T. ELLIOTT,
Public Defender,
Oklahoma County

/s/ John M. Stuart
JOHN M. STUART
Assistant Public Defender
Attorneys for Defendant

ACKNOWLEDGEMENT

I, Shirley Casey West, court reporter for the above styled and numbered cause, do hereby acknowledge this request on this 10th day of August, 1977.

/s/ Shirley Casey West
Court Reporter

CERTIFICATE OF SERVICE (omitted in printing)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-77-751

Filed Mar. 8, '79

FLYNN NOYE HICKS, APPELLANT,

vs.

THE STATE OF OKLAHOMA, APPELLEE.

OPINION

BUSSEY, Judge:

Appellant, Flynn Noye Hicks, hereinafter referred to as defendant, was convicted in the District Court, Oklahoma County, Case No. CRF-76-4597, of Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S.Supp. 1976, § 2-401, After Former Conviction of Felonies to wit: Burglary in the Second Degree and Assault and Battery With a Dangerous Weapon With Intent to do Bodily Harm. At the trial the State proved that Eugene Major, of the Multi-County Intelligence Agency, purchased a balloon of heroin from the defendant, and another from Dianne Jones, a codefendant on October 5, 1977.

Defendant asserts in his first assignment of error that the trial court erred in not permitting him to impeach the testimony of Agent Major by the use of a prior inconsistent statement. At the trial Major testified that prior to meeting the defendant he picked up a confidential informant. The defendant wished to call as a witness the court reporter from the preliminary examination, to testify that Major had said at that time that there was no informer. But at the trial Major also testified that he let the informer out of the car before he met the defendant, and that the informer was not present during any of the transaction.

In Oklahoma a witness may not be impeached by the use of inconsistent statements as to collateral matters. *Tarter* v. *State*, Okl.Cr., 350 P.2d 596 (1961). Since

the informant in the instant case was not present at the time Major bought the heroin, the issue of his existence was a collateral matter. Therefore the trial court's ruling was correct, and this assignment of error is without merit.

Defendant contends in his second assignment of error that the trial court erred by refusing to permit the court reporter to verify the accuracy of the transcript. We agree with the defendant's contention that a court reporter may be called to verify a transcript prepared by him. See *Lewis* v. *State*, Okl.Cr., 458 P.2d 309 (1969). We must find the error to be harmless, however, since we have found that its intended use to impeach the witness Major as to a collateral matter would have been improper.

Defendant urges in the third assignment of error that the trial court erred in invoking the rule of sequestration and then allowing the State to recall witnesses Major and Atwood. We have consistently held that it is within the discretion of the trial court to allow or exclude the testimony of a witness who has violated such rule. See *Kilgore* v. *State*, 10 Okl.Cr. 446, 137 P. 364 (1914) and *Slaughter* v. *State*, Okl.Cr., 236 P.2d 993 (1951). Absent a more definitive showing by defendant demonstrating an abuse by the trial court of its discretion in permitting the witnesses to testify, we must find this assignment of error to be without merit.

Defendant asserts in his fourth assignment of error that 21 O.S.Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State*, Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of 21 O.S.Supp. 1977, § 51(A).

Defendant next contends that he did not receive a fair trial because of the improper remarks of the prosecuting attorney. We have carefully examined each of the alleged improper remarks and observe that on only one occasion did defendant object to the remarks. In that instance, the

defendant failed to request that the jury be instructed to disregard the remark. We have repeatedly held that when an objectional statement is made by the prosecution, it should be called to the attention of the court by timely objection, together with a request that the jury be instructed to disregard the improper statement and in the event that the objection is overruled, an exception should be taken to the ruling of the Court, preserved and argued in the motion for new trial. When this is not done, the defendant is deemed to have waived any objection unless the remarks are so fundamentally prejudicial that the court cannot by instructions to the jury correct such error. See *Neal* v. *State*, Okl.Cr., 506 P.2d 936 (1976) and *Kern* v. *State*, Okl.Cr., 522 P.2d 644 (1974). Finding that the remarks were not so fundamentally prejudicial that they could not have been cured by instruction to the jury, we are of the opinion that this assignment of error is without merit.

Defendant finally contends that the accumulation of errors were so prejudicial as to justify reversal. Inasmuch as we have found defendant's preceding assignments of error to be without merit, it necessarily follows that this assignment of error is also without merit.

The judgment and sentence is accordingly *AFFIRMED*.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA, HONORABLE CHARLES L. OWENS, JUDGE,

FLYNN NOYE HICKS, appellant, was charged and convicted for the offense of Unlawful Distribution of a Con-

trolled Dangerous Substance; was sentenced to forty (40) years' imprisonment, and appeals. Judgment and sentence *AFFIRMED.*

JOHN T. ELLIOTT
Public Defender of Oklahoma County
DAVID W. LEE
Asst. Pub. Defender
JANE F. WHEELER

Attorney for Appellant

LARRY DERRYBERRY
Attorney General
JOE H. ENOS
Asst. Atty. Gen.

Attorneys for Appellee

OPINION BY BUSSEY, J.

CORNISH, P. J. and BRETT, J. CONCUR.

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

No. F-77-751

[Filed April 6, 1979]

FLYNN NOYE HICKS, APPELLANT

—*vs.*—

THE STATE OF OKLAHOMA, APPELLEE

ORDER DENYING PETITION FOR REHEARING AND ISSUANCE OF MANDATE FORTHWITH

On the 23rd day of March, 1979, a Petition for Rehearing was filed in case number F-77-751. After thorough consideration of the issues raised and the authorities cited, we are of the opinion that the Petition for Rehearing should be denied.

IT IS THE FURTHER ORDER of this Court, that the Mandate issue FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 6th day of April, 1979.

/s/ Tom R. Cornish
TOM R. CORNISH
Presiding Judge

/s/ Tom Brett
TOM BRETT
Judge

/s/ Hez J. Bussey
HEZ J. BUSSEY
Judge

ATTEST:

/s/ Ross N. Lillard, Jr.
Clerk

SUPREME COURT OF THE UNITED STATES

No. 78-6885

FLYNN NOYE HICKS, PETITIONER

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 26, 1979

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